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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No. _____

JAMES W. DEATON

PETITIONER

V.

U.S. DEPARTMENT OF AGRICULTURE

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 92-3283

James W. Deaton

Petitioner

v.

Department of Agriculture
Respondent.

Decided: September 25, 1992

Before Michel, Plager, and Rader, Circuit Judges. Per Curiam.

Decision

James W. Deaton (Deaton) petitions for judicial review of the October 8, 1991 decision of the Administrative Judge (AJ), Docket No. AT122191W0726, which upon denial of review on January 28, 1992 became the final decision of the Merit Systems Protection Board (MSPB or Board). 5 C.F.R. section 1201.113(b). At issue was Deaton's reassignment with no reduction of grade or pay from the position of Research Leader to that of Research Animal Scientist. This reassignment was appealed to the MSPB under the Individual Right of Action (IRA) provision of the Whistle Protection Act (WPA), 5 U.S.C. section 1221. The Board held that no corrective action was warranted. We affirm.

DISCUSSION

This case arises out of a difference of scientific opinion between Deaton and his supervisors. In January 1989, Deaton's laboratory facility was selected to perform research on the pathogenicity and transmission of ***Salmonella enteritidis*** in commercial chicken flocks. ***S. enteritidis*** is a known human pathogen which can contaminate eggs and other foodstuffs. While it thrives and reproduces inside the human body, it does not fare well when exposed to the ambient environment.

Specifically, Deaton was instructed to perform a study with an "open flock" simulating commercial settings. Deaton felt that the proposed infection with and study of ***S. enteritidis*** in an open flock would inevitably contaminate the surrounding environment and place the nearby residents and commercial enterprises at risk. In response to Deaton's expressed reservations, Drs. Thiermann and Beard of the Department of Agriculture (DOA) visited the facility and discussed the proposed research with Deaton. Thiermann generated a memo dated April 17, 1989, in which he detailed facility modifications and other recommendations which were, in his view, sufficient to conduct the open flock research in safety. Deaton apparently disagreed; he continued to believe that the open flock research would result in contamination of the environment, and he continued to vigorously object to the project. In June of 1989, DOA decided to reassign the open flock project to another research facility.

Deaton later documented his conflict with management in letters to the Office of Inspector General (OIG) date September 5, 1989 and October 11, 1989. On December 3, 1989, Deaton was reassigned to the non-managerial position of Research Animal Scientist. Deaton, believing that the reassignment was a direct consequence of his opposition to the open flock project and to his "whistleblowing" communications with the OIG, sought the aid of the Office of Special Counsel (OSC) in regaining his managerial position. After OSC declined to pursue Deaton's grievance, Deaton appealed the reassignment under the IRA provision of the WPA.

The WPA provides the IRA for employees whose personnel actions were taken in reprisal for disclosures of certain information. The disclosure must pertain to what the employee ***reasonably*** believes is a violation of law, rule or regulation, gross mismanagement, or "substantial and specific danger to public health or safety." 5 U.S.C. § 2302 (b) (8). The reasonableness of that belief must of course be measured at the time of the disclosure, not at time of subsequent appeals. It is a factual determination, and as such we must uphold the MSPB unless we find its determination to be unsupported by substantial evidence. 5 U.S.C. § 7703.

Here we find that substantial evidence supports the MSPB's conclusion that Deaton's view of the dangers posed by the open flock experiment were not reasonable under the circumstances. Among other

evidence, there was evidence concerning the nature of the risk from *S. enteritidis*, and the susceptibility of that pathogen to heat, light, and dryness. The record reflected communication between Drs. Thiermann and Beard (both of whom were found by the AJ to be credible and knowledgeable on the matter), and Deaton, and a memorandum from Dr. Thiermann to Deaton detailing the steps to be taken by Deaton's facility to contain any potential public health risk.

The MSPB found that there was more than sufficient evidence that the experiment did not pose a threat to health and safety, and therefore Deaton's beliefs were not reasonable. The MSPB concluded that there was no basis for Deaton's argument that his disclosures evidenced gross mismanagement or violations of law, rule, or regulation. Since there is substantial evidence in the record to support the MSPB's conclusion, we affirm the decision of the MSPB that corrective action was not warranted in this case.

No costs.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

JAMES W. DEATON, Appellant, V. DEPARTMENT OF AGRICULTURE, Agency.	DOCKET NUMBER AT122191W0726 DATE: October 8, 1991

James W. Deaton, Starkville, Mississippi, pro se.

Sarah Tuck, Esquire, Beltsville, Maryland, for the agency.

BEFORE

Howard J. Ansorge
Administrative Judge

INITIAL DECISION

INTRODUCTION

James W. Deaton, Ph.D., was a Research Leader, GM-15, in the Poultry Research Unit at the South Central Research Laboratory of the Agricultural Research Service of the Department of Agriculture at Mississippi State University in Starkville, Mississippi. On December 3, 1989, the appellant lost his Research Leader position when he was reassigned to the position of Research Animal Scientist, GM-15, without a reduction in grade or pay. On June 6, 1991, Dr. Deaton

appealed to the Board alleging that he was reassigned in retaliation for his whistleblowing activities. Because Dr. Deaton first sought relief from the Special Counsel, the Board has jurisdiction over this appeal. See 5 C.F.R. § 1209.2(b) (1) (1991). A hearing was held in Aberdeen, Mississippi on August 22, 1991.

For the reasons set forth below, I find that no corrective action is warranted in this appeal.

ANALYSIS AND FINDING

Background

The appellant's alleged whistleblowing activity arose out of his involvement in a scientific research project aimed at studying the human pathogen *Salmonella enteritidis* (SE) in poultry. Robert Oltjen, the Associate Deputy Administrator of the Agricultural Research Service (ARS), testified that the poultry industry and Congress had become concerned about the spread of the SE pathogen because of reports that people had contracted SE poisoning after consuming chicken eggs. According to Dr. Oltjen, the outbreak of SE poisoning had reached epidemic proportions in Britain by 1988. Dr. Oltjen testified that in fiscal year 1989 Congress allocated funds for food safety, specifically targeting the SE pathogen. The ARS program staff, which had the authority to allocate the funds, decided to study the SE pathogen in an open-flock setting because that is the environment that the poultry industry uses to house chickens. After inspecting several facilities, the

ARS program staff decided to conduct open-flock research in the flock house at the appellant's laboratory at Mississippi State University. Consequently, in January 1989, the appellant was directed to design a research project to determine the pathogenicity and transmission of the SE pathogen in a simulated flock environment and to develop new methods to diagnose and control the spread of SE. (Agency File at tab 4a). The ARS allocated approximately $650,000 for the project.

The appellant contends that he was asked to conduct the project in a manner that posed a danger to public health and safety. The appellant argues that the agency wanted him to infect 3,000 chickens in his laboratory's flock house and, thereby, produce 200 pounds of the SE pathogen per day. The appellant contends that the SE pathogen could not be contained inside the flock house because the pathogen could be carried by dust, insects, birds, rodents, and water. The appellant stated that dust and insects could transport the pathogen to the surrounding college dormitories as well as to the supermarket across the street from the appellant's laboratory. The appellant proposed renovating the laboratory's facilities to create a biocontained, air-conditioned flock room with high efficiency air and sewer filters as well as incinerators, back-up power generators, and security fencing. The estimated cost of the renovations proposed by the appellant was $1.9 million.

The appellant's superiors did not believe that the facilities at the

appellant's laboratory required the extensive bio-containment precautions that he proposed. The appellant's superiors believed that the spread of the SE pathogen could be safely controlled with fewer and far less expensive renovations to the flock house. (See April 17, 1989 letter to the appellant from Dr. Alexandro Thiermann describing the renovations necessary to conduct the SE research project, Agency File at tab 4e). Because they were unable to resolve this dispute, the SE research project was reassigned to a research facility in Pennsylvania in June 1989.

Whistleblowing

By letters dated September 5 and October 11, 1989, the appellant informed the agency's inspector general that the appellant's superiors were forcing him to grow the SE pathogen and release it into the environment. (Agency File at tabs 4j & 4o). Three months later, on December 3, 1989, the appellant was relieved of his responsibilities as Research Leader and reassigned to the position of Research Animal Scientist. The appellant contends that he was reassigned in retaliation for disclosing to the inspector general that his superiors were forcing him to release the SE pathogen into the environment on an unsuspecting public. The agency contends that the appellant's disclosure to the inspector general was not protected under § 2302(b)(8) because the proposed SE research project did not pose a substantial danger to public health or safety.

Burden of Proof

To prevail in this appeal, the appellant must establish by a preponderance of the evidence that a "disclosure" under 5 U.S.C. § 2302(b) (8) contributed to the agency's decision to reassign him. A protected "disclosure" under § 2302(b) (8) is defined as any disclosure of information by an employee that the employee "reasonably believes" evidences (a) a violation of any law, rule, or regulation or (b) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Analysis

The critical issue in this appeal is whether the open-flock research proposed by the appellant's superiors posed a danger to public health and safety. To support its contention that the proposed project was safe, the agency presented the testimony of Alexandro Thiermann, the agency's former National Program Leader for Animal Health. Dr. Thiermann is a doctor of Veterinary Medicine with a Ph.D. in immunology and microbiology. Dr. Thiermann testified that the SE pathogen is commonly found in eggs and is transmitted to humans by ingestion. Dr. Thiermann explained that the SE pathogen can only survive inside a moist, contained environment and is extremely sensitive to drying, sunlight, and temperature. Consequently, the SE pathogen dies within minutes after being exposed and cannot long survive while being transported on the surface of objects. Dr. Thiermann testified that the pathogen is transmitted to humans who have eaten poorly cooked

eggs and infects the gastrointestinal tract.

Dr. Oltjen confirmed that the SE pathogen is distinct from other types of salmonella because it forms inside eggs and is almost exclusively confined to eggs. In Dr. Oltjen's opinion, the SE pathogen can only be transmitted to humans who ingest eggs. The opinions of Drs. Oltjen and Thiermann are consistent with the February 17, 1989 task force report describing the agency's comprehensive program for dealing with the SE pathogen. (See Exhibit 8 of Volume 5 of the Report of Investigation of discrimination complaint, Record at tab 8).

Dr. Thiermann testified that the SE pathogen could be properly controlled at the appellant's laboratory and was not a danger to public health. Dr. Thiermann explained that the SE pathogen colonizes strictly inside the intestines after ingestion and that the SE pathogen is not transported by airborne dust or transmitted by exposure through breaks in the skin. Consequently, Dr. Thiermann testified, the air flow to and from the flock house did not require tight control in order to contain the spread of the SE organism. In addition, with the exception of using traps to contain feathers, untreated waste water could flow from the flock house without risk of spreading the organism because sewage treatment is sufficient to control the spread of the pathogen. Dr. Thiermann further testified that infected insects or rodents can only transmit the Se pathogen to humans if the insects or rodents deposit the pathogen on the outside of something that a person ingests before the

pathogen dies or if a person ingests the infected insect or rodent itself.

Dr. Thiermann further testified that Dr. Charles Beard is the most widely recognized poultry pathology expert in the nation.[1] According to Dr. Thiermann, Dr. Beard is the most renowned expert in diseases of poultry, the organisms that affect poultry, and the agents that cause infections in poultry. Both Drs. Oltjen and ARS Area Director Paul Putnam confirmed that Dr. Beard is an authority on SE. Dr. Thiermann further testified, without contradiction, that the appellant is familiar with Dr. Beard's expertise in poultry pathology because the appellant has known Dr. Beard for years and attended many conferences with him. In addition, Dr. Thiermann testified that both he and Dr. Beard toured the appellant's laboratory with the appellant in April 1989 and told the appellant at the conclusion of their inspection that the SE research project could be safely conducted with the modifications that they suggested. (See Dr. Thiermann's April 17, 1989 letter, Agency file at tab 4e)

Dr. Thiermann's testimony was corroborated by three other witnesses: ARS Deputy Administrator Edward Knipling, Ph.D.; ARS Area Director Paul Putnam, Ph.D.; and Associate Deputy Administrator Oltjen. All three witnesses testified that the experts employed by ARS believed that the proposed SE pathogen research project did not pose a danger to public health because there was little if any risk of human

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[1]The record shows that Beard has published over 120 scientific articles on diseases and infectious organisms in poultry.

infection.

Conclusion

The appellant presented no scientific evidence challenging the expertise of Dr. Thiermann or the credibility of his testimony. Consequently, the scientific evidence of record show that the SE pathogen is transmitted by ingesting poorly cooked eggs. The evidence also show that the possibility of transmitting the SE pathogen to humans through dust, water, insects, birds, or rodents is highly remote. The evidence further shows that the principal recognized authority in poultry pathology concluded that the proposed research did not pose a danger to public health and safety.

The undisputed evidence also shows that the appellant knew that Dr. Beard was the foremost nationally recognized authority in poultry pathology. The evidence further shows that Dr. Beard, as well as Dr. Thiermann, specifically told the appellant that it was safe to conduct open-flock research of the SE pathogen in the flock house located in the appellant's laboratory. Therefore, because the appellant admitted that he did not know the safety precautions required for conducting SE research, the appellant would have to reject Dr. Beard's assurances that the proposed testing method was safe. Given the appellant's knowledge of Dr. Beard's expertise in poultry pathology, I find that it was unreasonable for the appellant to so discount Dr. Beard's opinion. Therefore, I conclude that it was unreasonable for the appellant to

believe that the project posed a danger to public health and safety. Consequently, I find that the appellant could not have reasonably believed that his letters to the agency's inspector general disclosed a danger to public health and safety. As a result, I conclude that the appellant's letters to the inspector general were not protected disclosures within the meaning of the Whistleblower Protection Act.

The appellant also claimed that the agency's decision to proceed with open-flock SE research was gross mismanagement because of the danger that the SE pathogen could be released into the environment. Because the evidence shows that the SE research project posed no danger to public health and safety and that the appellant knew or should have known that the project was safe, I find that the appellant could not reasonably believe that his letters to the inspector general disclosed gross mismanagement. Therefore, I find that the appellant's letters were not protected disclosures of gross mismanagement under the Whistleblower Protection Act.

The Appellant further claimed that he would have violated various laws, rules, and regulations had he proceeded with the research project in his laboratory. The appellant cited a plethora of statutory and regulatory provisions that, he contends, would have been violated. The validity of the appellant's arguments in this regard are essentially dependent upon a finding that the SE research project posed a danger to the public health and safety. Because the evidence show that the SE

research project posed no danger to public health and safety and that the appellant knew or should have known that the project was safe, I find that the appellant could not have reasonably believed that his letters to the inspector general disclosed violations of any laws, rules, or regulations. Therefore, I find that the appellant's letters were not protected disclosures of statutory or regulatory violations under the Whistleblower Protection Act.

Finally, the appellant claimed that he disclosed an abuse of authority by notifying the inspector general that Area director Putnam told two scientists at an open meeting on July 21, 1989 that they would not be working at the laboratory after October 1989. Neither scientist testified at the hearing in this appeal and the appellant submitted no evidence that the two scientists in fact lost their jobs. Moreover, Area Director Putnam explained that the laboratory did not have the funds to support 2 of the 5 scientist positions because the laboratory lost $175,000 when funds were transferred to the research facility in Pennsylvania along with the SE research project in June 1989. Under the circumstances, I find the the appellant could not have reasonably believed that his letters to the inspector general disclosed an abuse of discretion. Therefore, I find that the appellant's letters were not protected disclosures under the Whistleblower Protection Act.

DECISION

No corrective action is warranted in this appeal.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

92-3283

James W. Deaton, Petitioner

v.

Department of Agriculture, Respondent.

JUDGEMENT

On appeal from the Merit Systems Protection Board in Case No. AT122191W0726. This cause having been heard and is considered, it is ordered and adjudged: Affirmed.

Entered By the Order of The Court

Dated Sep. 25, 1992 Frances X. Gindhart, Clerk

Issued as a mandate: October 27, 1992

ORDER

Before Michel, Circuit Judge, Plager, Circuit Judge, and Rader, Circuit Judge.

A petition for rehearing having been filed by the petitioner, upon consideration thereof, it is ordered that the petition for rehearing be, and the same hereby is denied.

The mandate will issue on October 20, 1992.

Dated: October 20, 1992 For The Court,

Filed: October 20, 1992 Francis X. Gindhart, Clerk by Diane M. Grye

cc. James W. Deaton and Robert E. Kirschman

Deaton V Agriculture, 92-3283 (MSPB - AT 122191W0726).